

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

77-4146

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-4146

LLOYD, CARR & CO., LLOYD CARR FINANCIAL CO.,
JAMES A. CARR AND CHARLES P. LEMIEUX, III,

Petitioners,

v.

COMMODITY FUTURES TRADING COMMISSION

Respondent.

On Petition for Review of an Order of the
Commodity Futures Trading Commission

BRIEF OF THE COMMODITY FUTURES TRADING COMMISSION, RESPONDENT

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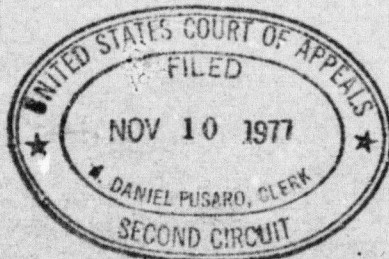
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COMMODITY FUTURES TRADING COMMISSION

Respondent.

On Petition for Review of an Order of the
Commodity Futures Trading Commission

BRIEF OF THE COMMODITY FUTURES TRADING COMMISSION, RESPONDENT

COUNTERSTATEMENT OF THE ISSUE PRESENTED

Did the Commodity Futures Trading Commission act within the scope of its authority and discretion in refusing to register Lloyd, Carr & Co. as a futures commission merchant, revoking the registration of Lloyd, Carr Financial Co. as a commodity trading advisor, and requiring Lloyd, Carr & Co. and Messrs. Carr and LeMieux to cease and desist from further violations of the Commodity Exchange Act and regulations where

1. the weight of evidence in the record showed, and the Commission found, that petitioners willfully and intentionally violated valid regulations adopted by the Commission under the Commodity Exchange Act by (a) selling commodity options while not registered with the Commission as a futures commission merchant, (b) knowingly

permitting individuals in their employ to offer and sell options without registering as associated persons, and (c) refusing to permit Commission personnel to inspect the books and records of Lloyd, Carr & Co.; and

2. fundamental fairness was observed in the administrative proceeding.

PRELIMINARY STATEMENT

Lloyd, Carr & Co., Lloyd Carr Financial Co. ("Financial Co."), and the two general partners of these firms--James A. Carr and Charles P. LeMieux III--have petitioned this Court to review an order entered by the respondent Commodity Futures Trading Commission on August 1, 1977 (A 181).^{1/} The order, which was entered pursuant to Sections 6(c), 8a(2) and 8a(3) of the Commodity Exchange Act, 7 U.S.C. §§13b, 12a(2) and 12a(3) (Supp. V, 1975), refuses to register Lloyd, Carr & Co. as a futures commission merchant and revokes the registration of Financial Co. as a commodity trading advisor.^{2/} It also directs Lloyd, Carr and Co. and Messrs. Carr and LeMieux to cease and desist from violating and aiding and abetting violations of registration, recordkeeping and inspection provisions of the Commodity Exchange Act and Commission regulations promulgated thereunder.^{3/}

^{1/} "A ____" refers to pages of the four-volume appendix to petitioners' brief. References to petitioners' brief are cited as "Br. ____."

^{2/} See nn. 12 and 13, *infra*.

^{3/} Judicial review of a Commission order denying registration under Section 8a(2), revoking registration under Section 8a(3), or requiring a person, pursuant to Section 6(c), to cease and desist from violations of the Act and regulations, may be

The Commission's order (A 181) and accompanying opinion (A 125) were issued at the conclusion of public administrative proceedings instituted on February 3, 1977, to determine whether Lloyd, Carr & Co. was unfit to engage in the business of a futures commission merchant and whether, on that basis, to refuse registration pursuant to Section 8a(2)(B) of the Act. The proceedings also sought to determine whether other remedial action should be taken in the public interest, including suspension or revocation of Financial Co.'s registration as a commodity trading advisor (Section 8a(3)), the assessment of civil monetary penalties against petitioners (Section 6(b), 7 U.S.C. §9 (Supp. V, 1975)), the suspension of petitioners' privilege to trade commodity futures (Section 6(b)), and an order requiring petitioners to cease and desist from further violative conduct (Section 6(c)).

Lloyd, Carr & Co. is engaged in the business of offering and selling commodity options to the public. Pursuant to Section 4c(b) of the Act, 7 U.S.C. §6c(b) (Supp. V, 1975), the Commission has adopted a series of regulations governing the offer and sale of commodity

3/ (Footnote continued)

obtained in accordance with Section 6(b) of the Act, 7 U.S.C. §9 (Supp. V, 1975). That Section provides in pertinent part:

"After the issuance of the order by the Commission . . . the person against whom it is issued may obtain a review of such order . . . by filing in the United States court of appeals of the circuit in which the petitioner is doing business a written petition, within fifteen days after the notice of such order is given . . . , praying that the order of the Commission be set aside Upon the filing of the petition the court shall have jurisdiction to affirm, to set aside, or modify the order of the Commission"

options in the United States. 17 C.F.R. Part 32 (1977).^{4/} The administrative complaint charged that Lloyd, Carr & Co. and its two general partners had violated and were continuing to violate Section 4c(b) and certain of the Commission's option regulations.

In particular, it was alleged (A 3-4) that on and after January 17, 1977, in violation of Section 4c(b) and Regulation 32.3 thereunder, 17 C.F.R. §32.3 (1977), Lloyd, Carr & Co., aided and abetted by Messrs. Carr and LeMieux, had been soliciting and accepting orders and funds from public customers for the purchase of commodity options while not registered as a futures commission merchant and had knowingly permitted individuals who were not registered with the Commission as associated persons of a futures commission merchant to solicit and accept orders for commodity options and to supervise persons so engaged. The complaint further alleged (A 5) that Lloyd, Carr & Co., aided and abetted by Messrs. Carr and LeMieux, had also failed to prepare and keep accurate and current books and records as required by Commission Regulations 1.18 and 32.7, 17 C.F.R. §§1.18 and 32.7 (1977), and that, in violation of these regulations and of Regulation 1.31, 17 C.F.R. §1.31 (1977), Lloyd, Carr & Co. had refused to permit Commission personnel on January 27, 1977, to inspect its books and records.

^{4/} The validity of the Commission's option regulations has been upheld by this Court in an action to which Lloyd, Carr & Co. was a party. British American Commodity Options Corp. v. Bagley, 552 F.2d 482 (2d Cir.), cert. denied, U.S. Nos. 77-96, 77-204 (November 7, 1977).

After a nine-day hearing held between March 9 and March 23, 1977, the administrative law judge ("ALJ") on April 13, 1977, filed a recommended decision (A 74), concluding that petitioners had violated the Act and regulations as charged. The ALJ recommended that (a) Lloyd, Carr & Co.'s application for registration as a futures commission merchant be denied; (b) the registration of Financial Co. as a commodity trading advisor, and the registration of Mr. LeMieux as an associated person, be revoked; (c) Lloyd, Carr & Co. be assessed a civil penalty of \$100,000 and Messrs. Carr and LeMieux each be assessed a civil penalty of \$10,000; (d) petitioners be ordered to cease and desist from violating the Act and regulations; and (e) petitioners be prohibited from futures trading on or subject to the rules of any contract market (A 106-107).

Following an independent consideration of the record as a whole the Commission found that petitioners had engaged in the violations of the Act and regulations as charged (A 131).^{5/} The Commission also determined (A 175) that petitioners' violations of the registration and inspection provisions had been intentional and deliberate--the "result of . . . decisions calculated to defy the Commission's authority." On the basis of these violations, the Commission refused Lloyd, Carr & Co.'s application for registration as a futures commission merchant, revoked Financial Co.'s registration as a commodity trading advisor and ordered petitioners to cease and desist from future violations. The

^{5/} Pursuant to Commission orders establishing expedited procedures for the conduct of the proceedings (A 31), the entire administrative record was certified to the Commission for decision in accordance with 5 U.S.C. §557.

Commission declined, however, to adopt the ALJ's further recommendations to assess civil money penalties against petitioners, revoke Mr. LeMieux' registration as an associated person, or to prohibit petitioners from trading in commodity futures. It concluded that these sanctions were unwarranted under the circumstances (A 180).

COUNTERSTATEMENT OF THE CASE

1. The Statutory Scheme of Regulation Under the Commodity Exchange Act and the Commission's Rules Governing Commodity Option Transactions

a. In response to increasing public participation in the commodities markets and the proliferation of abuses in unregulated commodity transactions, Congress, on October 23, 1974, enacted the Commodity Futures Trading Commission Act of 1974, Pub. L. 93-463, 88 Stat. 1389. That legislation extensively amended the Commodity Exchange Act, 7 U.S.C. §§1-17b (1970), and created the Commission as an independent regulatory agency, which, since April 21, 1975, has been responsible for administering and enforcing the provisions of the Commodity Exchange Act, as amended.

Prior to the 1974 amendments, the Commodity Exchange Act had been administered by the Commodity Exchange Authority of the Department of Agriculture, and had applied only to trading in certain specifically-enumerated agricultural commodities.^{6/} The 1974 amendments greatly

^{6/} Those commodities were wheat, cotton, rice, corn, oats, barley, rye, flaxseed, grain sorghums, mill feeds, butter, eggs, onions, *Solanum tuberosum* (Irish potatoes), wool, wool tops, fats and oils (including lard, tallow, cottonseed oil, peanut oil, soybean oil and all other fats and oils), cottonseed meal, cottonseed, peanuts, soybeans, soybean meal, livestock, livestock products, and frozen concentrated orange juice. 7 U.S.C. §2 (1970).

expanded the coverage of the Act to encompass virtually all previously unregulated commodities, by bringing within its scope substantially "all other goods and articles . . . and all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in" ^{7/} Those amendments also greatly expanded the regulatory authority of the Commission as compared to its predecessor agency, and gave the Commission "exclusive jurisdiction" to regulate

"accounts, agreements (including any transaction which is of the character of, or is commonly known to the trade as, an 'option' . . .), and transactions involving contracts of sale of a commodity for future delivery" ^{8/}

The main area of Commission responsibility relates to contracts of sale of commodities for future delivery traded or executed on boards of trade, (i.e., commodity exchanges) that have been designated by the Commission as "contract markets" for specific commodity futures contracts. ^{9/} It is unlawful to effect a commodity futures transaction otherwise than by or through a member of a board of trade that has been designated as a contract market by the Commission. ^{10/} In order for a board of trade to obtain designation as a contract market for a

^{7/} Section 2(a)(1) of the Act, 7 U.S.C. §2 (Supp. V, 1975).

^{8/} Section 2(a)(1) of the Act, 7 U.S.C. §2 (Supp. V, 1975) (emphasis added).

^{9/} A "board of trade" is defined in Section 2(a)(1) of the Commodity Exchange Act, 7 U.S.C. §2 (Supp. V, 1975), as

" . . . any exchange or association, whether incorporated or unincorporated, persons who shall be engaged in the business of buying or selling any commodity or receiving the same for sale on consignment"

^{10/} Section 4 of the Act, 7 U.S.C. §6 (Supp. V, 1975).

particular commodity futures contract, it must meet rigid requirements and must continue, after designation, to maintain specific standards, including enforcement of its rules and preventing manipulation and cornering of the market.^{11/} Furthermore, professional participants in the commodity futures markets including futures commission merchants,^{12/} persons associated with futures commission merchants, and commodity trading advisors,^{13/} must register with the Commission and comply with applicable antifraud, reporting, financial and recordkeeping provisions.^{14/}

^{11/} See Sections 5 and 5a, 7 U.S.C. §§7, 7a (Supp. V, 1975).

^{12/} A "futures commission merchant" is defined in Section 2(a)(1) of the Act, 7 U.S.C. §2 (Supp. V, 1975), as an individual or entity

" . . . engaged in soliciting or in accepting orders for the purchase or sale of any commodity for future delivery on or subject to the rules of any contract market and that, in or in connection with such solicitation or acceptance of orders, accepts any money, securities, property (or extends credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom"

^{13/} A "commodity trading advisor" is defined in Section 2a(1) as:

"any person who, for compensation or profit, engages in the business of advising others, either directly or through publications or writings, as to the value of commodities or as to the advisability of trading in any commodity for future delivery on or subject to the rules of any contract market, or who for compensation or profit, and as part of a regular business, issues or promulgates analyses or reports concerning commodities"

^{14/} Registration is required of futures commission merchants under Section 4d, 7 U.S.C. §6d (Supp. V, 1975), of persons associated with futures commission merchants under Section 4k, 7 U.S.C. §6k, (Supp. V, 1975), and of commodity trading advisors under Section 4m, 7 U.S.C. §6m. See also, e.g., Sections 4b (antifraud), 4e

(footnote continued)

In order to assure that unsuitable persons are prevented from acting professionally in these positions of sensitive public trust, Section 8a(2) of the Act, 7 U.S.C. §12a(2) (Supp. V, 1975), authorizes the Commission, among other things, to refuse to register a person as a futures commission merchant or as a commodity trading advisor if, after opportunity for hearing, the applicant is found unfit to engage in the activity for which registration is sought. Relevant to the case at bar, one of the express grounds upon which a finding of unfitness may be made, and registration refused, is that the applicant or any general partner of the applicant "at any time engaged in any practice of the character prohibited by this Act"

^{15/}
Section 8a(2)(B).

14/ (Footnote continued)

(floor broker registration), 4f (registration procedure and minimum financial requirements), 4g (reporting and recordkeeping), 4i (reporting), 4n (registration procedure) and 4o (antifraud) of the Act, 7 U.S.C. §§6b, 6e, 6f, 6g, 6i, 6n, and 6o (Supp. V, 1975).

15/ Section 8a provides in pertinent part:

"The Commission is authorized--

. . .

(2) to refuse to register any person--

. . .

(B) if it is found, after opportunity for hearing, that the applicant is unfit to engage in the business for which the application for registration is made, (i) because such applicant, or, if the applicant is a partnership, any general partner, . . . at any time engaged in any practice of the character prohibited by this Act"

. . .

Provided, That pending final determination under clause (B) . . . registration shall not be granted"

Significantly, Section 8a(2) further provides, supra n. 15, that "pending final determination" of the applicant's fitness for registration, "registration shall not be granted"

The Commission is also empowered under Section 8a(3) to suspend or revoke the registration of a person previously registered "if cause exists . . . which would warrant a refusal of registration of such person" pursuant to Section 8a(2).^{16/}

In addition, other remedial action may be taken by the Commission based upon violations of the Act and regulations thereunder. Thus, for example, if violations of the Act or Commission regulations should be proven in an administrative proceeding, the Commission, pursuant to Section 6(c), may enter an order directing the respondent to cease and desist from further violations.^{17/}

^{16/} Section 8a further provides in pertinent part:

"The Commission is authorized--

. . . .

(3) in accordance with the procedure provided for in paragraph (b) of section 6 of this Act, to suspend or revoke the registration of any person registered under this Act if cause exists under subparagraph (2)(B) [of Section 8a] . . . which would warrant a refusal of registration of such person"

^{17/} Section 6(c) of the Act, 7 U.S.C. §13b (Supp. V, 1975), provides in pertinent part:

"(c) If any person (other than a contract market) . . . is violating or has violated any of the provisions of this Act or of the rules, regulations, or orders of the Commission thereunder, the Commission may, upon notice and hearing . . . make and enter an order directing that such person shall cease and desist therefrom"

b. In contrast to the long-established system of regulation over the organized commodity futures exchanges, the selling of commodity options to the public, as it has developed in this country over the past 15 years, was not subject to comprehensive regulation by any governmental agency prior to 1975. While the Commodity Exchange Act prohibited option trading in specifically enumerated commodities prior to amendment in 1974 (see Section 4c(a)(B), 7 U.S.C. §6c(a)(B) (1970)), the Commodity Exchange Authority did not have jurisdiction over options offered with respect to any other commodities. Nor did any other agency have the power effectively to regulate options on these other commodities. No regulatory provision of state or federal law had even arguable application to commodity option activities except for statutes relating to the sale of securities, and those statutes, which had not been designed to deal with options,^{18/} had proved generally inadequate for that purpose.^{19/}

Because of this regulatory gap, fraudulent and unsound business practices developed. As a result, scandals occurred in the late 1960's and early 1970's where numerous option firms became insolvent or were otherwise unable to perform on option contracts. Thus, the House Committee on Agriculture reported that commodity option customers had been defrauded of millions of dollars after having been told that

^{18/} See, e.g., Hearings on S. 2485, S. 2578, S. 2837 and H.R. 13113 before the Senate Committee on Agriculture and Forestry, 93d Cong., 2d Sess., pt. 1, at 224-225 (1974) (testimony of Tom Maher).

^{19/} Id., pt. 3, at 682-683 (testimony of Glenn Willet Clark) and 830-835 (Statement prepared by James Ryan and Richard Malm). See generally e.g., Glazer v. National Commodity Research and Statistical Service, Inc., 547 F.2d 392 (7th Cir. 1977) in which it was recently held that commodity options are not securities as defined in the federal securities laws.

they were purchasing the "right" to buy or sell commodity futures contracts--a right for which they had paid a premium. The premiums had not been large and, since there were no margin calls, the option firms had attracted many customers. In certain cases, because it was relatively more expensive to purchase a commodity futures contract, many option firms had written options without "covering" their obligations by the acquisition of an offsetting position in the futures market.

The House Committee noted:

"It has been documented that, in some of these firms customers who desired the proceeds of their transaction in these options were actually paid in many instances from other customer's accounts, and eventually the pyramid structure created, where one customer's account is robbed to pay another, collapses" 20/

In order to close the loophole in the regulatory scheme concerning options, and thereby remedy these and similar abuses, Congress, when it amended the Commodity Exchange Act in 1974, sought fully

". . . to regulate trading . . . in options relating to commodities or commodity futures, because such trading is now poorly regulated, if it is regulated at all" 21/

For this purpose, Congress continued the existing ban on option trading with respect to the previously regulated commodities, 22/ and added a new section vesting pervasive authority in the Commission to determine

20/ H.R. Rep. No. 93-975, 93d Cong., 2d Sess. 37-38 (1974); See also Hearings on H.R. 11955 before the House Committee on Agriculture, 93d Cong., 2d Sess., ser. 93-TT, at 181-182, 194-196 (1974); Hearings on S. 2485, S.2578 and H.R. 13113 before the Senate Committee on Agriculture and Forestry, 93d Cong., 2d Sess. pt. 1, at 224-225, pt. 3, at 682-683, 830-835 (1974) (testimony of Tom Maher and Glenn Willet Clark, and statement prepared by James Ryan and Richard Malm).

21/ 120 Cong. Rec. H1027 (daily ed., October 9, 1974).

22/ See Section 4c(a)(B), 7 U.S.C. §6c(a)(B) (Supp. V, 1975).

whether option transactions should be permitted with respect to any other commodities and, if so, under what conditions.

This authority is set forth in Section 4c(b) of the Act, as amended, 7 U.S.C. §6c(b) (Supp. V, 1975), which provides in pertinent part:

"No person shall offer to enter into, enter into, or confirm the execution of, any [commodity option] transaction . . . contrary to any rule, regulation, or order of the Commission prohibiting any such transaction or allowing any such transaction under such terms and conditions as the Commission shall prescribe"

This provision is implemented through the Commission's general rulemaking authority contained in Section 8a(5) of the Act, 7 U.S.C. §12a(5) (Supp. V, 1975), which broadly empowers the Commission

"to make and promulgate such rules and regulations as, in the judgment of the Commission, are reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of [the Act]"

c. In response to this statutory mandate, the Commission adopted interim option regulations on November 22, 1976, which impose registration, disclosure, minimum financial, book and recordkeeping, inspection, segregation of funds and antifraud requirements upon persons engaged in the business of selling commodity options. 41 Fed. Reg. 51808, et seq. (November 24, 1976).^{23/} Pertinent to the instant case, the regulations

^{23/} The interim option regulations were adopted by the Commission substantially in the form proposed on October 8, 1976, 41 Fed. Reg. 44560, although certain technical and other changes were made as a result of comments received from the public. The regulations were the result of a protracted rulemaking proceeding in which the Commission had earlier considered public comment on various alternative approaches to option regulation. See 40 Fed. Reg. 49360 (October 22, 1975); 41 Fed. Reg. 7774 (February 20, 1976). The history of the rulemaking proceeding was described by this Court in British American Commodity Options Corp. v. Bagley, supra, 552 F.2d at 486-488.

make it unlawful, on and after January 17, 1977, for any firm to solicit or accept orders, money or property from an option customer for the purchase of a commodity option unless it is registered with the Commission as a futures commission merchant. See Rule 32.3(a) and (b)(1)(i) of the regulations, 17 C.F.R. §32.3(a) and (b)(1)(i) (1977). These regulations further prohibit individuals--on and after January 17, 1977--from soliciting or accepting orders for commodity option transactions, or supervising persons so engaged, without being registered with the Commission as a futures commission merchant or an associated person of a specified futures commission merchant. See Rule 32.3(b)(1)(ii), 17 C.F.R. §32.3(b)(1)(ii) (1977). In addition, Rule 32.3(b)(2), 17 C.F.R. §32.3(b)(2) (1977), makes it unlawful for a futures commission merchant to permit individuals to be associated with it if it knows or should know that they are not registered with the Commission as associated persons.

The regulations also impose minimum financial and recordkeeping requirements upon option firms. Thus, an option firm registered as a futures commission merchant must have a minimum capital which is the greater of \$50,000 or an amount computed in accordance with a specified formula. See Rule 1.17, 17 C.F.R. §1.17 (1977). In addition, under Rule 32.7 of the regulations, 17 C.F.R. §32.7 (1977), each person engaged in the offer and sale of commodity options must prepare and maintain specified

books and records in accordance with Rule 32.7, as well as Rules 1.18 and 1.31, 17 C.F.R. §§32.7, 1.18 and 1.31 (1977). These books and records must be produced for inspection when and as required by any authorized representative of the Commission. Rules 1.31 and 32.7(e), 17 C.F.R. §§1.31 and 32.7(e) (1977).^{24/}

In announcing adoption of its option regulations, the Commission emphasized that they were designed to provide minimal customer protection in an area historically fraught with abuse, and to permit a gradual phase-in of a rigidly-controlled pilot program restricting option trading to Commission-designated domestic boards of trade and foreign exchange systems. 41 Fed. Reg. at 51808. The Commission explained, among other things, that it had chosen to restrict the offer and sale of options to firms registered as futures commission merchants in order to assure that persons wishing to sell options to the public would therefore have to meet the standards of fiduciary responsibility, and the record-keeping and other regulatory requirements that Congress had chosen to impose upon persons performing similar functions in connection with futures transactions. 41 Fed. Reg. at 51810. In addition, this approach, the Commission stated, would enable the Commission to exclude unsuitable persons from acting as professional participants in the option

^{24/} Pursuant to Rule 32.5, 17 C.F.R. §32.5 (1977), option firms also must affirmatively disclose to prospective option customers specified information relating to the option being offered and particularized price information regarding the option. Under Rule 32.6, 17 C.F.R. §32.6 (1977), an option firm that accepts funds from a customer for the purchase of an option must segregate in a separate account and treat as the property of the customer, 90% of the customer's funds until such time as the option either expires or is exercised by the customer.

field by applying the same statutory criteria under which the Commission may generally refuse entry into the futures industry (see supra, pp. 9-10).

At the time the Commission proposed its interim option regulations in October 1976, and again when it announced their adoption in November 1976, the Commission informed interested persons that the registration process would generally take from thirty to sixty days. 41 Fed. Reg. at 44563; 41 Fed. Reg. at 51810. Accordingly, it urged affected parties who were then engaged or seeking to engage in the sale of options promptly to make application for registration. In this way the Commission would have sufficient time to act on their registration applications prior to January 17, 1977--after which it would be unlawful for unregistered firms and individuals to solicit and accept orders and funds from option customers for the purchase of options. 41 Fed. Reg. at 51810.

2. Petitioners' Violations of Registration, Record-keeping and Inspection Provisions Under the Commodity Exchange Act

On or about July 1, 1976, James A. Carr organized Lloyd, Carr & Co. as a sale proprietorship with its principal offices in Boston, Massachusetts (A 406). The firm, with Mr. Carr as president, immediately commenced to engage in the public offer and sale of so-called "London commodity options"^{25/} through telephone

^{25/} A commodity option gives the purchaser a contractual right to buy, or sell, a commodity or commodity future by some specific date at a specified, fixed price, known as the striking price. "London options" of the type offered by Lloyd, Carr & Co. relate to futures contracts and commodities traded on exchanges in London, England. See British American Commodity Options Corp. v. Bagley, supra, 552 F.2d at 485.

solicitations of prospective customers (A 399, 406, 953-954). In late July 1976, Mr. Carr also formed Financial Co. as a partnership with Mr. LeMieux (A 407). That firm, which registered with the Commission as a commodity trading advisor on November 19, 1976, also engaged in the offer and sale of London options (A 406-408).

Financial Co. operated through the same facilities as Lloyd, Carr & Co. until mid-January when Financial Co.'s option activities and assets were taken over by Lloyd, Carr & Co., which was reconstituted as a partnership between Messrs. Carr and LeMieux sometime between January 18 and 20, 1977 (A 407).^{26/} In their partnership relationships Mr. Carr had primary responsibility for these firms' day-to-day policy decisions, while Mr. LeMieux handled sales, training activities for sales personnel, and other administrative functions (A 410-413).

^{26/} Mr. Carr testified at the administrative hearing (A 409) that Financial Co. and Lloyd, Carr & Co. were "more or less" considered by him "as a Lloyd, Carr group" and that the names were used "interchangeably." While petitioners have claimed (Br. at 5) on this basis that the two firms were the same entity, without any distinction, Mr. Carr testified (A 407) that he had formed Financial Co. as a partnership with Mr. LeMieux because he wanted to afford Mr. LeMieux the opportunity to be associated in business with him but had not wished to risk any portion of Lloyd, Carr & Co.—the firm Mr. Carr had originally founded—as part of the partnership venture. Moreover, Mr. Carr acknowledged that, unlike Financial Co., "Lloyd, Carr & Co. is not a commodity trading advisor" (A 443), and none of the applications for registration submitted by Financial Co. to the Commission indicated that Financial Co. was doing business under any other name, including the name of Lloyd, Carr & Co. (A 1007; A 1027).

On October 1, 1976--one week before the Commission publicly proposed to adopt option regulations requiring registration as a futures commission merchant as a condition to doing an options business (see supra, pp. 13-14)--Financial Co. filed an application with the Commission for registration as a futures commission merchant (A 1007) because it proposed to engage in commodity futures activities for which registration would be required (A 794). The application, however, failed to include a statement of financial condition on CFTC Form 1-FR as required under Commission Regulation 1.10, 17 C.F.R. §1.10 (1977), lacked necessary biographical information on Messrs. Carr and LeMieux, was undated and was unsigned. For these reasons, the application was returned to Financial Co. under cover of a letter, dated October 12, 1976, which detailed the application's deficiencies (A 1011).

Either at that time or shortly thereafter the petitioners knew or should have known that the Commission on October 8, 1976, proposed a rule to require registration as a futures commission merchant as a condition to the sale of commodity options after January 17, 1977, had publicized the fact that registration might take as long as 60 days after an application had been filed (41 Fed. Reg. at 44563), and had urged affected firms promptly to apply for registration in order to avoid risk of failing to be registered on January 17, 1977. In fact, on November 19, 1976--five days before the Commission adopted its option regulations in final form (41 Fed. Reg. at 51808)--Lloyd, Carr & Co. and others

instituted an action in federal district court in which, among other things, it sought unsuccessfully to enjoin the effectiveness of the proposed registration requirement. This Court ruled in that case that the plaintiffs "did have reasonable advance notice that registration would be required" See British American Commodity Options Corp. v. Bagley, 552 F.2d 482, 491 (2d Cir.), cert. denied, U.S. Nos. 77-96, 77-204 (November 7, 1977), affirming in relevant part CCH Comm. Fut. L. Rep. ¶20,245 at p. 21,325 (S.D.N.Y. 1976).^{27/} Indeed, Mr. Carr, in the proceeding below admitted his timely awareness of these matters (A 469-470).

Nevertheless, it was not until January 17, 1977, that a completed application and statement of financial condition was resubmitted to the Commission on behalf of Financial Co. (A 489, 702). The Commission, however, acted promptly. Within three days after receipt of the application on January 17, Commission personnel were dispatched to the firm's Boston office and, on January 20 and 21, 1977, undertook a pre-registration audit of Financial Co.'s books and records. In the course of the audit, a number of discrepancies quickly appeared between the information

^{27/} In November 1976, following several earlier unsuccessful attempts to contact Financial Co. concerning its application, a member of the Commission's staff reached Mr. Carr by telephone, explained the deficiencies in Financial Co.'s application and advised Mr. Carr that no further steps in the registration process could be taken until a properly completed application was submitted. When asked whether Financial Co. intended to reapply for registration, Mr. Carr stated that he would contact the Commission staff in about a week (A 700). No subsequent communication having been received from petitioners, Mr. Carr was called again in mid-December and was again reminded that no properly completed application had yet been received by the Commission (A 703). Thereafter, in a December 22, 1976, telephone call from petitioners' counsel, a staff member again confirmed that Financial Co.'s application had not, as of that date, been resubmitted to the Commission (A 702).

contained on the financial statement (on Form 1-FR) filed with Financial Co.'s January 17 application, and the data being supplied to the auditors by Financial Co.'s accountants. (A 554, 556-557). As a result, an amended Form 1-FR was prepared by Financial Co. and given to the Commission auditors on January 20 while the audit was in progress (A 557-558).

The audit further revealed, however that Financial lacked trial balance and general ledgers and cash receipt and disbursement journals (A 554, 561). In fact, when asked to produce Financial's books and records, Mr. Carr could only provide bank statements, carrying brokers' month-end statements, and customer's order forms "in a box, and also some three-by-five index cards which shows the option orders for the customers" (A 553). Accordingly, on January 20, 1977, the Commission's auditor orally advised Mr. Carr and Financial Co.'s accountants that the firm's books were not being prepared or kept in accordance with Commission Regulation 1.18 because, among other things, Financial lacked current records supporting its liability, income or expense accounts (A 562, 567).^{28/} In response, the firm's accountants assured the Commission auditor that the books would be adequate "in maybe a week or so" (A 562).

The audit further revealed that Financial Co. was claiming as assets funds in bank accounts held in Lloyd, Carr & Co.'s name as well as funds in accounts held in the name of Financial Co. (A 341-342, 685-687). At least one of these accounts had also been used as a personal account by Mr. Carr (A 509).

^{28/} Mr. Carr was further advised by telephone on January 24 or 25, 1977, that Financial Co.'s records were "too vague" to comply with Regulation 1.18 (A 342-343).

In a telephone conversation held on or about January 24, Mr. Carr was alerted to the problems presented by the commingling of assets between the two entities and the questions that had otherwise been raised concerning the applicant's financial situation (A 342-343). To resolve these problems it was apparently suggested that Financial Co. submit a revised application that accurately reflected its true ownership of assets and financial condition (A 342, 848). When a new application and Form 1-FR were filed with the Commission on January 25, 1977, however, it was, for the first time, submitted in the name of Lloyd, Carr & Co.—which was described on the application as a Massachusetts partnership between Messrs. Carr and LeMieux (A 488, 705, 848, 1046, 1050, 1056).^{29/}

Nevertheless, the Commission was prepared to move promptly on the new application. On January 26, 1977, the day after the application was filed, a member of the Commission's staff called Mr. Carr and informed him that, in view of the filing of the new application for Lloyd, Carr & Co. and in view of the recordkeeping and other difficulties found in the earlier audit of Financial Co., it would be necessary to conduct an additional audit to determine whether all regulatory criteria for registration had been met. He indicated, however, that the Commission's

^{29/} Under Commission Regulation 1.15, 17 C.F.R. §1.15 (1977),

"A new registration shall be required in the event of a change: (a) In the name of the registrant; (b) In the form of organization of the registrant; (c) In the ownership of the business of the registrant in the case of a sole proprietorship;"

staff was prepared to go forward with the audit the very next day, January 27. (A 332-333).

When Mr. Carr was informed that representatives of the Commission's Enforcement Division would participate in the audit, Mr. Carr arranged for a conference telephone call to be held that afternoon between him, his attorney, and Commission attorneys (A 332, 839). In that conversation Mr. Carr and his attorney specifically refused to permit any further inspection of Lloyd, Carr & Co.'s books and records until after the Commission had registered the firm (A 354, 840-841).

Although Lloyd, Carr & Co. and Financial Co. had not been registered as futures commission merchants, on or after January 17, 1977, petitioners continued without interruption to solicit and accept orders and funds for the purchase of commodity options, and to permit salespersons, who were not registered with the Commission as associated persons, to engage in that activity on behalf of Lloyd, Carr & Co. Between January 17 and March 2, 1977 Lloyd, Carr & Co. received approximately \$787,000 from commodity option sales (A 1017-1023).

Three employees of Lloyd, Carr & Co. testified that from January 17, 1977, up to the very day of the hearing on March 10, 1977, they had engaged in the solicitation and acceptance of commodity option orders and funds for Lloyd, Carr & Co. while unregistered as associated persons. One of these salespersons stated that during this period she had solicited an estimated 1500 to 2000 prospective

customers (A 232). Another salesperson had contacted 1000 to 2000 persons during the same period (A 369), while a third had made 50 to 100 telephone calls per day. (A 256). A customer of the firm testified that after January 17 he had dealt directly with Mr. Carr concerning the purchase of an option (A 299-300).

When called as a witness in the proceeding, Mr. Carr confirmed that, under his direction, Lloyd, Carr & Co. had continued to do business on and after January 17 and that the decision to engage in option sales activities on and after January 17 had been deliberate (A 787-789). Mr. Carr responded as follows to questions concerning the results of discussions he had with Mr. LeMieux on or about "the 17th or the 18th or the 19th" of January:

"Q --And were any decisions made at those discussions between you and Mr. LeMieux?

A [Mr. Carr]--I think the decision is obvious, Mr. Levie. We continued to sell options.

Q --And did Mr. LeMieux concur in that decision? Was it a joint decision between you and Mr. LeMieux?

A [Mr. Carr]--I--I--it was the kind of decision that is kind of familiar to me. It was a foregone conclusion that we would." (A 788).

He admitted knowing, however, that Lloyd, Carr & Co. and Financial Co. were required to be registered by January 17, 1977, if their subsequent option sales were to be lawful (A 470).

A similar "foregone conclusion" was reached by Messrs. Carr and LeMieux in permitting Lloyd, Carr & Co. salespersons to continue to

engage in the solicitation and acceptance of orders for options after January 17 while not registered as associated persons. Despite the fact that Mr. Carr understood the requirements of the registration provision that Lloyd, Carr & Co. had unsuccessfully challenged, supra, pp. 18-19 (A 475), and knew that the applications of 38 of Lloyd, Carr & Co.'s employees had not even been submitted to the Commission until January 20, he consciously refrained from instructing these individuals to cease their sales activities (A 487).

3. The Commission's Decision

Based on these facts, the Commission found that Lloyd, Carr & Co., aided and abetted by Messrs. Carr and LeMieux, "knowingly and willfully" violated the registration provisions of Regulation 32.3 by the "affirmative decision" of Messrs. Carr and LeMieux to continue selling commodity options on and after January 17, 1977, despite their clear understanding that this would be a violation of the Commission's regulations (A 143). The Commission rejected petitioners' claim, based upon Financial Co.'s registration as a commodity trading advisor, that they were entitled under Section 9(b) of the Administrative Procedure Act, 5 U.S.C. §558(c), to sell options on and after January 17, pending consideration of their application for registration as a futures commission merchant. The Commission pointed out that registration as a commodity trading advisor permitted Financial Co. to give commodity trading advice, but did not constitute a license for that firm or any other person to engage in the offer and sale of options (A 149). The

Commission further observed, in any event, that petitioners had, by their own dilatory conduct, failed to make a "timely and sufficient" application for registration, which would in any event be necessary to invoke the provisions of Section 9(b) (A 146-153).

The Commission also concluded (A 154-155) that petitioners had also violated Regulation 32.3 by having permitted salespersons of Lloyd, Carr & Co. to continue to solicit and accept commodity option orders on and after January 17 although most of them were not registered with the Commission as associated persons. As to this conduct, the Commission emphasized that petitioners "did not even attempt to comply with the regulations prior to January 17," having failed to submit applications for registration of any of its employees as associated persons until January 20 (A 154).

The Commission further determined (A 145) that the information it had obtained from the January 20-21 audit of Financial Co. had been inadequate to establish that either Lloyd, Carr & Co. or Financial Co. met the requirements for registration as a futures commission merchant, and, consequently, that a second audit had been "essential to the integrity" of the registration process (A 145-146). The Commission observed that in refusing Commission personnel access to Lloyd, Carr & Co.'s books and records for the necessary second audit, the petitioners had exhibited a "degree of audacity . . . perhaps unsurpassed in this newly-regulated industry" (A 157). The Commission viewed as untenable the petitioners' claim that they were entitled to deny the Commission inspection because Division of Enforcement personnel sought to participate.

The Commission noted its right to inspect the records of any applicant for registration and that the Commission, not the applicant, was entitled to decide which of the Commission's personnel would be assigned the task (A 159).

After concluding that petitioners' books and records had not been complete and had failed to satisfy the "regulatory purpose" of Regulations 1.18 and 32.7 during the period from January 20 and 21 through January 26 (A 159-160), the Commission determined that, because of petitioners' refusal to permit a second audit, there was "no probative evidence before it" to establish subsequent compliance (A 161). That refusal, the Commission said, "cast a long shadow" over petitioners' "intent to comply with the book and recordkeeping requirements" (A 163).

Noting that under Sections 8a(2)(B) and 8a(3) the Commission is authorized, without more, to find an applicant or registrant unfit to be registered and to refuse or revoke registration once a violation of the Act and regulations is found, the Commission, in explaining its choice of remedies in the case at bar, stated (A 175):

"We base our decision to impose these sanctions only upon these intentional and deliberate violations, i.e., respondents' continuation of business activities after January 17, 1977, without registration of Lloyd, Carr & Co. as a futures commission merchant and without registration of many of its salespersons as associated persons, and respondents' refusal to permit a second audit of its books and records by the Commission's staff. Any single one of these deliberate violations justifies the imposition of the sanctions we have determined to impose. However, we do not base the imposition of any sanction upon the violations we find relating to the condition of respondents' books and records, since those violations were not, at least at the outset, the result of deliberate decisions calculated to defy the Commission's authority."

STATUTE AND RULES INVOLVED

Section 4c(b) of the Commodity Exchange Act, 7 U.S.C. §6c(b) (Supp. V, 1975) and Commission Regulations 1.18, 1.31, 32.3 and 32.7, 17 C.F.R. §§1.18, 1.31, 32.3 and 32.7 (1977), are set forth in the statutory appendix, infra at SA 1, et seq.

ARGUMENT

- I. THE COMMISSION PROPERLY CONCLUDED THAT PETITIONERS WILLFULLY VIOLATED REGISTRATION AND OTHER PROVISIONS UNDER THE COMMODITY EXCHANGE ACT; ON THIS BASIS IT WAS ENTITLED TO REFUSE TO REGISTER LLOYD, CARR & CO. AS A FUTURES COMMISSION MERCHANT AND TO IMPOSE REMEDIAL SANCTIONS AGAINST PETITIONERS.

1. Section 8a(2)(B)(i) of the Act provides that "[t]he Commission is authorized . . . to refuse to register" a person where it finds, after opportunity for hearing, that the applicant

"is unfit . . . because such applicant or . . . any general partner [of the applicant] . . . at any time engaged in any practice of the character prohibited by this Act"

Thus, by its express terms this statutory provision reflects a congressional judgment that proof of a violation of the Act, standing alone, will establish an applicant's unfitness to engage in business activities requiring registration as a futures commission merchant and will permit the Commission to refuse registration on that basis.

Cf., Savage v. Commodity Futures Trading Commission, 548 F.2d 192, 196 (7th Cir. 1977).

Likewise, a finding of violation satisfies the statutory prerequisite under Section 8(a)(3) of the Act for revoking the

existing registration, among others, of commodity trading advisors, and for the imposition of other remedial sanctions. Cf., Silverman v. Commodity Futures Trading Commission, ___ F.2d ___, CCH Comm. Fut. L. Rep. ¶20,487 at p. 21,975 (7th Cir. 1977); Haltmier v. Commodity Futures Trading Commission, 554 F.2d 556 (2d Cir. 1977). Furthermore, under Section 13(a) of the Act, 7 U.S.C. §13(c) (Supp. V, 1975), any person who willfully aids and abets a violation of any provision of the Act or Commission regulation thereunder "may be held responsible . . . for such violation as a principal" in administrative proceedings conducted under the Act.^{30/}

As we have seen (supra, p. 13), Section 4c(b) of the Act forbids any person "to offer to enter into, enter into or confirm the execution of, any [commodity option] transaction . . . contrary to any rule, regulation or order of the Commission" Consequently, a violation of the registration, bookkeeping or inspection provisions of the Commission's option regulations, which were adopted pursuant

^{30/} Section 13(a) provides that:

"Any person who commits, or who willfully aids, abets, counsels, commands, induces, or procures the commission of, a violation of any of the provisions of this Act, or any of the rules, regulations or orders issued pursuant to this Act, or who acts in combination or concert with any other person in any such violation, or who willfully causes an act to be done or omitted which if directly performed or omitted by him or another would be a violation of the provisions of this Act or any of such rules, regulations, or orders may be held responsible in administrative proceedings under this Act for such violation as a principal."

to Section 4c(b), constitutes a "practice . . . prohibited by . . . [the] Act" that will justify refusal of registration under Section 8a(2)(B)(i).

Moreover, this Court has previously considered and upheld the validity of the Commission's option regulations against a challenge by Lloyd, Carr & Co., among others. British American Commodity Options Corp. v. Bagley, supra, 552 F.2d 482. In British American, Lloyd, Carr & Co. specifically attacked whether the registration provision was reasonable in requiring registration by January 17, 1977—rather than the mere filing of an application by that date. Lloyd, Carr & Co. asserted that the Commission might exclude an applicant from continuing to engage in the options business simply by delaying action on the application, and that the Commission had not provided sufficient time to assure that applications could be processed by the deadline. 552 F.2d at 491.

"Viewing the Commission's conduct as a whole, however," this Court concluded that "substantial injustice or gratuitous disruption" had not resulted from adoption of the registration requirement or from the manner in which the Commission had handled registration applications that had timely been filed. This Court observed, id.:

"Plaintiffs [including Lloyd, Carr & Co.] did have reasonable advance notice that registration would be required and could not rely on the possible success of their lawsuit as an excuse for not being prepared to file." 31/

31/ This Court further observed (552 F.2d at 491) (emphasis added):

". . . [T]he Commission has not dragged its feet on the application filed. After oral argument, the Commission advised us by letter that it had not

(footnote continued)

In so ruling, the Court implicitly held that the solicitation and acceptance of orders and funds for the purchase of commodity options on and after January 17 by any person not duly registered with the Commission would constitute a violation of Regulation 32.3 under the Act. This conclusion is reinforced by the provision of Section 8a(2) of the Act: "That pending final determination . . . [of fitness for registration] registration shall not be granted"

As parties to the British American litigation, Lloyd, Carr & Co. and its two general partners are bound by this Court's judgment in that case under the doctrine of res judicata. As a result, petitioners may not in the case at bar relitigate this Court's prior decision upholding Regulation 32.3, which made it unlawful for Lloyd, Carr & Co. to have engaged in option sales on and after January 17, 1977, without having been registered. Nor may petitioners now contest any other matter raised, or which might have been presented by them in that suit, concerning the validity of the regulations that they were charged with having violated, and found to have violated, in the administrative proceeding below.

In these circumstances, the only significant question now presented to this Court is whether the evidence in the administrative record is sufficient to support the Commission's findings that petitioners willfully violated the Act and regulations, as charged.

31/ (Footnote continued)

yet acted on the filings of only two of the plaintiff firms, both of which had filed during January. Three other plaintiffs remain unregistered, but they are the subject of administrative proceedings brought by the Commission to determine whether registration should be refused. Under the circumstances, the attack on the registration requirement must fail."

If the Commission's findings of fact may be sustained--as plainly they must be--the Commission was entitled under Section 8a(2), 8a(3) and 6(c) of the Act, based solely on the violations the Commission found, to deny Lloyd, Carr & Co. registration as a futures commission merchant, to revoke the registration of Financial Co. as a commodity trading advisor and to direct petitioners to cease and desist from their unlawful conduct. As the Court of Appeals for the Seventh Circuit stated in affirming a Commission refusal to register a commodity trading advisor under Section 8a(2):

"The Commission retains discretion to permit registration if it should be persuaded that the applicant, . . . [despite the disqualifying act] presents no danger to the public; but this fact does not cast doubt upon the authority of the Commission to refuse registration on proof of the disqualifying act alone."

Savage v. Commodity Futures Trading Commission, supra, 548 F.2d at 196-197 (emphasis added). See also Silverman v. Commodity Futures Trading Commission, supra, CCH Comm. Fut. L. Rep. ¶20,245 at p. 21,979-21,980; Haltmier v. Commodity Futures Trading Commission, supra, 554 F.2d at 564.

2. Section 6(b) of the Commodity Exchange Act, which confers authority on this Court to review Commission orders, provides that "the findings of the Commission as to the facts, if supported by the weight of evidence, shall . . . be conclusive." Since the Commission's findings are amply supported by the weight of the evidence in the record below, there is no basis for this Court to disturb the Commission's decision.

The courts have consistently defined the term "weight of evidence" as used in Section 6(b) as meaning "the preponderance" or "greater weight of the evidence." See, e.g., Haltmier v. Commodity Futures Trading Commission, supra, 554 F.2d at 560; Kent v. Hardin, 425 F.2d 1346, 1349 (5th Cir. 1970); G.H. Miller & Co. v. United States, 260 F.2d 286, 288 (7th Cir. 1958), cert. denied, 350 U.S. 907 (1959); General Foods Corp. v. Brannan, 170 F.2d 220, 224 (7th Cir. 1948). Furthermore, as this Court recognized in Haltmier v. Commodity Futures Trading Commission, supra, 554 F.2d at 560:

"The court's function 'is something other than that of mechanically reweighing the evidence to ascertain in which direction it preponderates; it is rather to review the record with the purpose of determining whether the finder of fact was justified, i.e., acted reasonably, in concluding that the evidence, including the demeanor of the witnesses, the reasonable inferences drawn therefrom and other pertinent circumstances supported his findings.' Great Western Food Distributors v. Brannan, 211 F.2d 476, 479-480 (7th Cir. 1953)." 32/

Thus, under the weight of evidence test, it is the responsibility of the Commission, rather than a reviewing court, to resolve conflicts in and the credibility of testimony, and to draw inferences from the record. 33/
Goodman v. Benson, 286 F.2d 896, 900 (7th Cir. 1961).

32/ Accord, Silverman v. Commodity Futures Trading Commission, 549 F.2d 26, 30-31 (7th Cir. 1977); Cargill, Inc. v. Hardin, 452 F.2d 1154, 1163 (8th Cir. 1971), cert. denied, 406 U.S. 932 (1972); Volkart Bros. Inc. v. Freeman, 311 F.2d 52 (5th Cir. 1962); Goodman v. Benson, 286 F.2d 896, 899-900 (7th Cir. 1961).

33/ Relying upon Collins Securities Corp. v. Securities and Exchange Commission, CCH Fed. Sec. L. Rep. ¶96,122 (D.C. Cir. 1977), petitioners suggest (Br. 45-46) that this Court should adopt the more stringent standard of clear and convincing evidence in reviewing orders of the Commission imposing remedial

The evidence adduced in the administrative proceeding, including the testimony offered by Mr. Carr, was substantially in accord concerning the facts establishing petitioners' violations of the registration, inspection, and bookkeeping provisions of the Commission's option regulations. With respect to the registration violations, it was undisputed that neither Lloyd, Carr & Co. nor Financial Co. were at any time on and after January 17, 1977, registered with the Commission as a futures commission merchant. Nor was there any dispute that a substantial number of Lloyd, Carr & Co. employees had not even applied for registration as associated persons until January 20 and necessarily were not registered by January 17 (see supra, pp. 22-24).

33/ (Footnote continued)

sanctions. But whatever standard might be appropriate to proceedings under federal securities laws, Section 6(b) of the Commodity Exchange Act is unambiguous as to the standard to be employed by this Court under that Act. As this Court recognized in Haltmier v. Commodity Futures Trading Commission, supra, 554 F.2d at 560:

"Unlike most other legislation providing for judicial review of agency decision, the Commodity Exchange Act (as carried forward by the Commodity Futures Trading Commission Act) declares that 'the findings of the Commission as to the facts, if supported by the weight of evidence shall . . . be conclusive.'"

In any event, Collins is clearly distinguishable from the case at bar. The Collins court expressly confined application of the "clear and convincing" standard to cases involving fraud where proof of violation is typically shown through circumstantial evidence. CCH Fed. Sec. L. Rep. ¶96,122 at p. 92,045 n. 32. In contrast, the instant appeal involves registration, inspection and bookkeeping violations which were established through direct and for the most part uncontroverted testimony.

In addition, as we have seen, supra, pp. 22-23, three Lloyd, Carr & Co. salespersons testified that, although not registered as associated persons, they had solicited thousands of prospective customers to purchase options from Lloyd, Carr & Co. between January 17 and March 10, 1977; and a customer of the firm testified that he had personally been solicited by Mr. Carr during this period. Moreover, bank statements of Lloyd, Carr & Co. and Financial Co., which were identified by Mr. Carr, showed that petitioners had received about \$787,000 from option sales during the period January 17 to March 2, 1977 (A 508-509, 515-525, 1192-1198).

There is nothing in the record to controvert this evidence. Indeed, Mr. Carr admitted that petitioners continued to conduct their option business on and after January 17, and that he had not directed Lloyd Carr & Co. salespersons to cease soliciting activities even though he knew they were not registered as associated persons (see supra, pp. 23-24).

There is likewise no evidence in the record to contradict the testimony of Commission staff members that on January 26, 1977, representatives of the Commission were refused access to Lloyd, Carr & Co.'s books and records for purposes of pre-registration audit. In asserting that they were justified in this action, Mr. Carr necessarily conceded the facts proving violation of the inspection provision by corroborating that a request to inspect Lloyd, Carr & Co.'s records had been made and that he had refused to allow Commission representatives access (see supra, p. 22).

The Commission's determination that petitioners' books were not in compliance with recordkeeping requirements likewise rests on essentially unrefuted testimony of Commission audit personnel who were involved in the pre-registration examination of Financial Co. on January 20 and 21. As previously discussed (supra, p. 20), their audit revealed that Financial Co. records consisted of bank statements and index cards of customer accounts stored in a carton, and that the firm lacked trial balance and general ledgers as well as cash receipt and disbursement journals. Since the Commission was denied subsequent access to Lloyd, Carr & Co.'s books, it was not possible to ascertain whether these deficiencies had been corrected, and whether, in light of the commingling of funds between the two firms, Lloyd, Carr & Co.'s books accurately reflected ownership of assets in bank accounts previously in the name of Financial Co.^{34/}

^{34/} Commission Regulation 1.18, 17 C.F.R. §1.18 (1977), requires an applicant for futures commission merchant registration to demonstrate that it "prepares and keeps current, ledgers or other similar records which show or summarize with appropriate references to supporting documents each transaction affecting [its] asset, liability, income, expense and capital accounts" In addition, Regulation 32.7(a), 17 C.F.R. §32.7(a) (1977), requires anyone accepting money to purchase a commodity option to "keep full, complete and systematic records together with all pertinent data and memoranda of or relating to such transactions." As minimal compliance the regulation defines the records to "at least include . . . books of record, journals, ledgers" These latter terms of art are understandable to an accountant or bookkeeper with some experience in the brokerage industry (A 863-864, 866, 880-881, 883). As the evidence showed, appropriate journals and ledgers were not maintained and, as petitioners even now concede (Br. at 10), Financial Co.'s accountants had to undertake preparation of supporting documentation and schedules relating to their financial condition while the audit was in progress, since they had not previously been in existence.

Petitioners would have this Court accept Mr. Carr's version of relevant events, particularly those bearing on the sufficiency of petitioners' records (Br. 12-14). But the ALJ, in discussing the credibility and demeanor of the witnesses at the hearing, noted that ". . . Mr. Carr seemed to slide over some very important facts during his testimony" (A 98). In contrast, the ALJ found Commission personnel called as witnesses to be "open, candid, and without any prejudice toward . . . [petitioners]" (A 98). The Commission specifically adverted to these observations in its opinion (A 142) and properly considered their import in making its findings. See Silverman v. Commodity Futures Trading Commission, supra, 549 F.2d at 32; Great Western Food Distributors v. Brannan, supra, 201 F.2d at 479.

In any event, the Commission decided to deny registration and to impose sanctions based solely on petitioners' violations of registration and inspection requirements, each of which, it concluded, would independently justify the action taken against petitioners (A 175). That determination is amply supported by the record since the evidence reflects not merely that these violations were "willful" but, as the Commission found (ibid.), that they were intentional and deliberate as well.^{35/}

^{35/} The Commission's option rules do not require willful conduct in order to prove a violation. Nor do Sections 8a(2)(B), 8a(3) or 6(c), pursuant to which these proceedings were brought, impose a requirement that violations of the Act or regulations thereunder must be willful before the Commission may issue an order refusing registration and imposing remedial sanctions, although a showing of willfulness under Section 13(a) is necessary to hold a person who aids and abets a violation responsible for that violation.

Petitioners observe (Br. at 10,41) that Section 9(b) of the Administrative Procedure Act, 5 U.S.C. §558(c), provides:

(footnote continued)

This is not a situation where a person has engaged in violative conduct because of uncertainty concerning applicable legal requirements, neglect of legal duty or even through a reckless disregard of statutory responsibilities. To the contrary, having been

35/ (Footnote continued)

"Except in cases of willfulness . . . the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given" written notice of the action complained of and "an opportunity to demonstrate or achieve compliance with all lawful requirements." They assert that the Commission has not complied with this notice requirement. But this provision does not apply to the denial of a new license, but only to action adversely affecting a license previously granted. Thus the Commission's refusal to grant a registration to Lloyd, Carr & Co. is unaffected by this provision. To the extent that the Commission's revocation of Financial Co.'s registration as a commodity trading advisor is subject to this provision, the Commission's express finding of willfulness is sufficient to bring the case with the express exception to the notice requirement. See Silverman v. Commodity Futures Trading Commission, supra, 549 F.2d at 31. In this regard it is well settled for purposes of the Commodity Exchange Act and other remedial statutes that it is unnecessary for a finding of willfulness that evil motive or an awareness by the actor that he is violating the Act or rules be shown. Rather, it is sufficient

". . . if a person (1) intentionally does an act which is prohibited, . . . or (2) acts with careless disregard of statutory requirements, the violation is willful."

Goodman v. Benson, supra, 286 F.2d at 900; accord, e.g., Haltmier v. Commodity Futures Trading Commission, supra, 554 F.2d at 562; George Steinberg and Son, Inc. v. Butz, 491 F.2d 988, 994 (2d Cir. 1974), cert. denied, 419 U.S. 830 (1974); Jaffee & Company v. Securities and Exchange Commission, 446 F.2d 387, 392 (2d Cir. 1971); Tager v. Securities and Exchange Commission, 344 F.2d 5, 8 (2d Cir. 1965); Eastern Produce Co. v. Benson, 278 F.2d 606, 609 (3rd Cir. 1960).

unsuccessful in their legal challenge to the Commission's registration regulation, the petitioners chose to ignore its requirements anyway. Thus, the record demonstrates (supra, pp. 18-19) that petitioners were fully aware that the Commission's regulations prohibited their sale of options on and after January 17, 1977, without registration; yet they consciously decided to continue to engage in option sales on and after that date and to raise "no objection to their [unregistered employees] selling options" (A 387, 487). Likewise, petitioners' decision to refuse Commission representatives access to Lloyd, Carr & Co.'s records was reached at the conclusion of two telephone conversations with Commission personnel in which the Commission's right to inspect Lloyd, Carr & Co.'s records under the regulations was made unmistakably clear (A 839-841).

3. Petitioners claim they may avoid accountability for their patently unlawful conduct because (Br. 38-41), in their own assessment, Financial Co. satisfied the substantive requirements for registration as a futures commission merchant as of January 17. But the record refutes the claim that Financial Co. met the standards for registration on that date (see supra, pp. 19-21). Moreover, that circumstance, even if true, would not provide a basis to engage in business activities plainly proscribed by law in the absence of registration. The judgment whether to grant or deny registration under the Act rests with the Commission; it is not a judgment an applicant may arrogate to itself. If petitioners believed that Financial Co. was entitled to registration and that the Commission was not acting with appropriate dispatch, its remedy was not to ignore the requirements of law but to bring an

action to "compel agency action unlawfully withheld or unreasonably delayed." See 5 U.S.C. §706(1).

Petitioners also contend (Br. at 42-43) that since Financial Co. had originally submitted an application for registration on October 1, 1976, petitioners were entitled, under Section 9(b) of the Administrative Procedure Act, 5 U.S.C. §558(c), to continue in business pending a determination by the Commission whether to grant or deny registration. But petitioners' reliance on Section 9(b) of the Administrative Procedure Act is wholly misplaced. That Section provides in pertinent part:

"When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency."

The purpose of this provision is "to protect a person with a license from the damage he would suffer by being compelled to discontinue a business of a continuing nature, only to start it anew after the administrative hearing is concluded." Pan-Atlantic Steamship Corp. v. Atlantic Coast Line Ry. Co., 353 U.S. 436, 439 (1957) (emphasis added). See also Committee for Open Media v. Federal Communications Commission, 543 F.2d 861, 867 (D.C. Cir. 1976). Thus, the Supreme Court has made clear that to obtain the protections conferred by Section 9(b)

". . . there must be a license outstanding; it must cover activities of a continuing nature; there must have been filed a timely and sufficient application to continue the existing operation; and the application for the new or extended license must not have been finally determined."

Pan Atlantic, supra, 353 U.S. at 435.

As we have seen, however (supra, p. 21), Lloyd, Carr & Co. did not file an application with the Commission until January 25, 1977, while the grossly inadequate application originally filed by Financial Co. on October 1, 1976, had not been resubmitted in proper form until January 17--the very day that firms were required to be registered to engage lawfully in option transactions. Thus, neither application was timely filed.

Moreover, neither Lloyd, Carr & Co. nor Financial Co. possessed an outstanding license covering the activities for which application was made. While Financial Co. was registered as a commodity trading advisor, that registration merely permitted that firm to render commodity trading advice--as defined in Section 2(a)(1) of the Act--to more than 15 persons in a year, assuming all applicable regulatory requirements were met, see Sections 4m, 4n and 4o of the Act, 7 U.S.C. §§ 6m, 6n, and 6o (Supp. V, 1975). That registration does not purport to license the solicitation and acceptance of orders and funds for the purchase of options. See Commodity Futures Trading Commission v. British American Commodity Options Corp., 560 F.2d 135, 143 (2d Cir. 1977). Thus, contrary to petitioners' claim (Br. 43), the fact that Financial Co.'s application for registration as a futures commission merchant was pending did not allow it to continue in the options business on and after January 17, 1977.

Petitioners now argue that they did not oppose a "true 'second audit,'" but, rather, objected only to participation by the Division of Enforcement (Br. at 48-49). Under Regulation 1.31 and Regulation

32.7(e),^{36/} however, any duly authorized Commission employee is entitled to gain access to a regulated person's books and records to ascertain compliance with the law. It is for the Commission, not the regulated person, to decide which Commission employee shall be authorized and when books and records will be inspected. Thus, the Commission and the ALJ were clearly justified in concluding that (A 157):

"... this attempt to limit inspection by Commission personnel according to respondents' own self determined standards evidences a 'degree of audacity . . . perhaps unsurpassed in this newly-regulated industry.'"

36/ The main objection that Lloyd, Carr & Co. has advanced to participation of Division of Enforcement personnel in any audit was their concern that the Division might, on the basis of information obtained in the audit, contact respondents' customers to speak to them about respondents' business practices. While this possibility is pure speculation in the context of this case, it would, in any event, have been entirely proper for the Commission staff to have contacted customers had it chosen to do so. See American International Trading Company v. Bagley, 536 F.2d 1196, 1198 (7th Cir. 1976). In fact, Regulation 32.7(c), which this Court recently sustained in British American Commodity Options Corp. v. Bagley, *supra*, 552 F.2d at 493, requires option firms to maintain a lists of customers to facilitate such an inquiry.

Petitioners' alleged fear of patently legitimate potential inquiry concerning its business activities cannot justify their willful refusal to obey lawful requirements. As this Court observed in Securities and Exchange Commission v. Brigadoon Scotch Distributing Co., 480 F.2d 1040, 1056 (2d Cir. 1973), cert. denied, 415 U.S. 915 (1974):

"Every person doing business and every investor knows that government agencies conduct investigations for a variety of reasons, and most of them feel the duty to respond to a proper inquiry. As for those whose practices are investigated, it is a necessary hazard of doing business to be the subject of inquiry by a government regulatory agency."

See also, e.g., United States v. Morton Salt Co., 338 U.S. 632, 642-643 (1950); Securities and Exchange Commission v. Howatt, 525 F.2d 226, 229 (1st Cir. 1975).

Petitioners' subsequent refusal to permit the independent audit of its books and records offered by Administrative Law Judge Painter permitted him to conclude(A 102), and the Commission to agree(A 158), that this action "lays to rest any argument that respondents refusal was predicated upon fear of persecution by this agency."

II. THE REMEDIAL ACTION TAKEN AGAINST PETITIONERS
WAS WELL WITHIN THE COMMISSION'S DISCRETION.

In American Power & Light Co. v. Securities and Exchange Commission, 329 U.S. 90, 112-113 (1946) (emphasis added), the Supreme Court enunciated the standard for judicial review of an agency's judgment concerning remedial action to effectuate the public interest:

"It is a fundamental principle . . . that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy the relation of remedy to policy is peculiarly a matter for administrative competence . . . while recognizing that the Commission's discretion must square with its responsibility, only if the remedy chosen is unwarranted in law or has no justification in fact should a court attempt to intervene in the matter."

This fundamental principle has repeatedly been applied by the Supreme Court, this Court and other courts of appeals in cases involving the imposition of sanctions under the Commodity Exchange Act and other regulatory statutes. See e.g., Butz v. Glover Livestock Commission Co., 411 U.S. 182, 185-186 (1973); Haltmier v. Commodity Futures Trading Commission, supra, 554 F.2d at 563; Silverman v. Commodity Futures Trading Commission, supra, CCH Comm. Fut. L. Rep. ¶20,487 at p. 21,980; Goodman v. Benson,

286 F.2d 896, 900-901 (7th Cir. 1961). Cf. Tager v. Securities and Exchange Commission, supra, 344 F.2d at 8-9; Pierce v. Securities and Exchange Commission, 239 F.2d 160, 163-164 (9th Cir. 1956).

In a recent review of remedial action taken by this Commission, this Court emphasized "that an agency sanction within statutory limits can be upset only if it reflects an abuse of discretion" Haltmier v. Commodity Futures Trading Commission, supra, 554 F.2d at 563. In a similar context, reviewing an order of the Securities and Exchange Commission revoking the registration of a securities broker, this Court noted:

"Registration of broker-dealers is a means of protecting the public . . . and the determination of the sanctions necessary to protect the public rests primarily within the competence of the Commission The Commission must have a very large measure of discretion in determining what sanctions to impose at a particular time in particular cases."

Tager v. Securities and Exchange Commission, supra, 344 F.2d at 8-9.

Thus,

"[f]ailing a gross abuse of discretion, the courts should not attempt to substitute their untutored views as to what sanctions will best accord with the regulatory powers of the Commission."

Id. at 9. Accord, e.g., Federal Trade Commission v. Universal Rundle Corp., 387 U.S. 244, 250 (1967); Moog Industries, Inc. v. Federal Trade Commission, 355 U.S. 411, 413-414 (1958); Arthur Lipper Corp. v. Securities and Exchange Commission, 547 F.2d 171, 183 (2d Cir. 1976), and cases cited therein.

No abuse of discretion can be found on the facts at bar. This Court has recently emphasized the crucial role played by registration requirements under the Commodity Exchange Act:

"The intent of the congressional decision is clear; persons engaged in the defined regulated activities within the commodities business are not to operate as such unless registered, Registration is the kingpin in this statutory machinery, giving the Commission the information about participants in commodity trading which it so vitally requires to carry out its other statutory functions of monitoring and enforcing the Act."

Commodity Futures Trading Commission v. British American Commodity Options Corp., supra, 560 F.2d at 139-140 (emphasis added). This Court noted, id. at 142:

"Permitting unregistered commodity trading advisors unlawfully to continue furnishing advice would not only nullify this statutory prohibition, but would also undermine and perhaps destroy the whole congressional scheme of regulation in this highly sensitive area of public trust."

In view of these considerations, this Court directed the entry of an injunction against a firm unlawfully giving commodity trading advice while its application for registration as a commodity trading advisor was still pending before the Commission. Id. at 142-143.

In the instant case, the Commission, in considering Lloyd, Carr & Co.'s application for registration as a futures commission merchant, was required either to register the firm or to deny the application. See Section 8a(2). In view of the vital function of the registration provisions and petitioners' deliberate decision to engage in commodity

options transactions in flagrant disregard for applicable legal requirements, denial of Lloyd, Carr & Co.'s application for registration^{37/} was the only meaningful choice. The Commission noted (A 177) that it

"has received a mandate from Congress to establish order in and control over an industry unused to the feel of stringent government regulation. In this context, and at this stage of its existence, the Commission must make its expectations known to all and to assert its authority when called for, lest it invite defiance from those subject to its regulations. . . ."

The Commission stated it was not willing to

"risk that the public at large will be exposed to commodity professionals who conduct business with callous disregard for the law. The highest ethical standards must prevail in every facet of the commodity options industry."
(A. 177)

Petitioners argue that the action taken by the Commission was unduly harsh, punitive, vindictive and bears no relationship to the public interest (Br. at 51-52, 56-57). But the sanctions imposed-- refusal and revocation of registration and an order to cease and desist--reflect a deliberate judgment by the Commission to select sanctions commensurate with the violations proven; they could hardly

37/ The Commission expressly imposed sanctions

"only upon these intentional and deliberate violations, i.e., respondents' continuation of business activities after January 17, 1977, without registration of Lloyd, Carr & Co. as a futures commission merchant and without registration of many of its salespersons as associated persons, and respondents' refusal to permit a second audit of its books and records by the Commission's staff" (A 175).

have been less stringent for this purpose.^{38/} Denial and revocation of registration are necessary and appropriate "to safeguard the public interest." Silverman v. Commodity Futures Trading Commission, supra, CCH Comm. Fut. L. Rep. ¶20,487 at p. 21,981. By its power to deny registration the Commission may screen applicants to assure that only those meeting the highest ethical standards will be allowed to engage in the futures and options industry. See Commodity Futures Trading Commission v. J.S. Love & Associates Options, Ltd., 422 F. Supp. 652 (S.D.N.Y. 1976). The sole alternative in this case would have been for the Commission to have registered a firm demonstrably indifferent to legal requirements. There is no principle of law under which the Commission had any obligation to do so.

The requirement that petitioners cease and desist from further violations is but a "mild prophylactic." Cf. Capital Gains Research Bureau v. Securities and Exchange Commission, 375 U.S. 180 (1963). It merely requires the petitioners to obey those provisions of the Act and regulations that the Commission found them to have violated. Violations of the cease and desist order carry potentially severe

^{38/} The Commission could have imposed more stringent sanctions than it did. The Commission decided not to impose civil money penalties authorized by Section 6(b) of the Act--penalties that could potentially have amounted to several million dollars. The Commission also refrained from imposing contract market trading prohibitions or revoking Mr. LeMieux' associated person registration. These three additional sanctions had been sought by the Division of Enforcement, and recommended by the ALJ.

Moreover, we note that even the Commission's decision to deny Lloyd, Carr & Co.'s application and revoke the registration of Financial Co. does not prevent these firms from reapplying for registration at some future date. See Vanasco v. Securities and Exchange Commission, 395 F.2d 349, 353 (2d Cir. 1968).

civil and even criminal penalties, which the Commission noted were "particularly appropriate in this case since we have no reason to believe that respondents will heed the Act and our regulations any more in the future than they have in the past" (A 178). Indeed, the Commission has since found it appropriate to institute an administrative proceeding to determine whether that cease and desist order has been violated and, if so, whether to impose further sanctions for those violations. See Matter of Lloyd, Carr & Co., CFTC Docket No. 78-1.^{39/}

^{39/} Petitioners' erroneously rely on Arthur Lipper Corp. v. Securities and Exchange Commission, *supra*, 547 F.2d 171 and Beck v. Securities and Exchange Commission, 430 F.2d 673 (6th Cir. 1970), to support their contention that the sanctions the Commission imposed should be set aside because of their "severity." Those cases merely recognize that an appellate court may review the imposition of sanctions to determine whether, in a particular case, the sanction chosen constituted an abuse of discretion. They do not, however, support any claim that the sanctions at bar were not well within the Commission's authority to impose.

In Lipper, there was no possibility of repetition of the offense. The offense had been committed during a period of "considerable uncertainty as to the regulatory climate concerning give-ups . . .," there existed a three-year hiatus between the argument and Commission decision and there was a "tremendous disparity" between Lipper's sanctions and those of other more culpable violators. None of these factors is present here. The regulatory scheme including the requirement of registration by January 17, 1977, was clear and unambiguous, as this Court recognized in British American Commodity Options Corp. v. Bagley, *supra*, 552 F.2d at 491. Moreover, the entire administrative proceeding was concluded within a few months after the last proven violation and the sanctions imposed were appropriate to the facts. In Beck, the court noted that the factors which led to the violations had occurred 9 years previously and found no reason to expect further violations.

Petitioners emphasize that the Commission found no "fraud, manipulation . . . breach of fiduciary duty" or adverse impact on any contract market (Br. at 51, 54, 56-57).^{40/} But the Commission's authority to deny or revoke registration under the Commodity Exchange

40/ Petitioners argue that their "fair dealing and training program" have never been disputed by the Commission (Br. at 56). The Commission considered this argument in its assessment of the evidence in mitigation presented by petitioners below. The Commission said (A 176):

" . . . respondents extol their fair dealing and salesperson training program. However, even assuming such averments to be true, they do not lead us to a different result. The complaint did not question respondents' fair dealing or training program. While we place high value on such factors in certain circumstances, in this case they do not redeem respondents' calculated disregard of the law; they do not relate to respondents' deliberate violations of the Act, which the Commission considers to be critical to its decision to impose sanctions; nor do they evidence any rehabilitation of respondents which would lead us to a different conclusion. Thus we do not accept respondents' arguments in mitigation as proper justification for declining to impose any sanctions. See Savage v. Commodity Futures Trading Commission, supra, 548 F.2d at 196-197."

Although petitioners tout their "fair dealing" (Br. at 51, 56-57), in an action brought by the Michigan Attorney General in which the Commission has intervened, a temporary restraining order was entered against Lloyd, Carr & Co. on November 7, 1977, by the United States District Court for the Western District of Michigan based, among other things, upon alleged violations of the Commission's antifraud regulation, 17 C.F.R. §32.9 (1977). See Kelley v. Carr, W.D.Mich., No. G77-550 CA5 (November 7, 1977).

Act is not limited to circumstances of fraud, manipulation, breach of fiduciary duty or adverse impact upon a contract market.^{41/} To the contrary, an applicant or registrant may be found unfit, and registration revoked or denied, based, among other things, upon any violation of the Act or regulations. See Sections 8a(2), supra, n. 15 and accompanying text.^{42/}

Petitioners further assert that sanctions short of a revocation or denial of registration have been imposed in some cases

^{41/} The Commission suggested that civil money penalties under Section 6(b) would be more appropriate in cases of fraud, manipulation, or breach of fiduciary duty than in the present case (A 179). However, the Commission continued (A 180):

"This is not to downplay the gravity of respondents' offenses; it is only to say that by denying and revoking Commission registration of the firms and ordering respondents to cease and desist upon pain of further Commission action or criminal prosecution, stern yet responsive sanctions will have been meted out--which in the Commission's view fit the offenses which have been committed."

^{42/} A similar argument was recently rejected by this Court in Commodity Futures Trading Commission v. British American Commodity Options Corp., supra, 560 F.2d at 142, where it was held:

"The district court erred in concluding that the 'mere' continuation of the proscribed activities [giving trading advice while unregistered] is not the necessary repetition of a wrong to warrant the injunction unless there is, in addition, proof of fraud or misconduct. . . . [V]iolations of . . . [the registration requirement] alone are sufficient to require the injunction in this case."

in which fraud has been involved (Br. at 55-57).^{43/} But the imposition of an administrative sanction within the scope of an agency's authority is not "invalid" merely because it differs or even is "more severe than sanctions imposed in other cases." Butz v. Glover Livestock Commission Company, Inc., supra, 411 U.S. at 187 and cases there cited; see also Haltmier v. Commodity Futures Trading Commission, supra, 554 F.2d at 563. The Commission must exercise its discretion on a case-by-case basis (Haltmier v. Commodity Futures Trading Commission, supra, 554 F.2d at 564). Here, the quality of the petitioners' violations was far more significant to the Commission than the nature of their violations. The deliberate, calculated and pervasive violations of the law by persons in control of a company's affairs must surely be a basis upon which the Commission may deny or revoke registration. That conclusion is unaffected by the possibility that the Commission might find mitigating circumstances in other cases--even those involving fraud--that would lead the Commission to a different result.

Petitioners contend further that the Commission's choice of sanctions serves to single them out as an example to the industry (Br. at 55-56). The Commission, however, was entitled to impose a

^{43/} Petitioners' citation (Br. at 56) to In re Siegel Trading Co., CCH Comm. Fut. L. Rep. ¶20,452, as an example, is grossly misleading. That decision is only an initial decision of an ALJ that is on appeal to the Commission. The Commission did not, as petitioners assert, let the decision stand.

sanction calculated, among other things, to "deter others from following respondent's footsteps" (A 177). Both this Court and the Court of Appeals for the Seventh Circuit have recognized that the Commission may impose sanctions pursuant to the Commodity Exchange Act to serve a deterrent purpose. Haltmier v. Commodity Futures Trading Commission, supra, 554 F.2d at 564; Silverman v. Commodity Futures Trading Commission, supra, CCH Comm. Fut. L. Rep. ¶20,487 at p. 21,980. See also Securities and Exchange Commission v. Manor Nursing Centers, 458 F.2d 1082, 1104 (2d Cir. 1972).

The remedial function of Commission sanctions could hardly be served if no regard is paid to the "general signal" that a sanction will send to industry members. Haltmier v. Commodity Futures Trading Commission, supra, 554 F.2d at 564. And the need for deterrence is nowhere as great as in an industry as unaccustomed to government regulation, and as historically fraught with abuses, as the commodity options industry. See pp. 11-12, supra. Thus, any "personal detriment" suffered by the petitioners as a result of Commission denial or revocation of registration is outweighed by "'the necessity of protection to the public . . . resulting from the impact of applicable laws'" See, e.g., Haltmier v. Commodity Futures Trading Commission,

supra, 554 F.2d at 564, quoting Associated Securities Corp. v. Securities and Exchange Commission, 283 F.2d 773, 775 (10th Cir. 1960).^{44/}

Since the Commission's opinion clearly articulated the reasons for its particular choice of sanctions (Haltmier v. Commodity Futures Trading Commission, supra, 554 F.2d at 564), and a "rational connection" exists between the violations proven and the sanctions imposed (Silverman v. Commodity Futures Trading Commission, supra, CCH Comm. Fut. L. Rep. ¶20,487 at p. 21,980), there is no merit to petitioners' request that this Court substitute its judgment of the appropriate remedial sanction for that of the Commission, the body designated by Congress to determine the sanctions to be applied.

^{44/} Although denial of Lloyd, Carr & Co.'s futures commission merchant application may effectively put it "out of business" (Br. at 51), this evidences no deficiency in the Commission's choice of sanctions; that is the precise purpose the sanction is intended to serve. In Commodity Futures Trading Commission v. British American Commodity Options Corp., supra, 560 F.2d at 143, this Court rejected the argument that the loss of financial benefits resulting from on-going violations of the law is a basis upon which to deny an injunction to that would terminate such violative conduct.

III. THE ADMINISTRATIVE HEARING AFFORDED
PETITIONERS DUE PROCESS OF LAW.

Although the proceeding before the Commission was conducted on an expedited basis, the petitioners were afforded full and fair opportunity, among other things, to subpoena witnesses, present documentary and testimonial evidence and to conduct extensive cross-examination of witnesses offered against them.^{45/} Thus, petitioners do not challenge the adoption of the expedited procedures or demonstrate that they have suffered any prejudice as a result of those procedures.^{46/}

^{45/} On February 17, 1977, the Division of Enforcement moved the Commission, pursuant to Rule 10.3 of the Commission's Rules of Practice, 17 C.F.R. §10.3 (1977), to order that the administrative proceedings be conducted on an expedited basis (A 10-17). On March 2, 1977, the Commission ordered that its Rules of Practice, 17 C.F.R. §§10.1-10.108 (1977), be waived, and adopted specific expedited procedures for conducting the administrative proceeding. In its March 2 order the Commission concluded that adoption of the expedited procedures would not prejudice any party and that such procedures would serve the ends of justice (A 31-35). The Commission found the charges in the complaint were not complex, that there was no claim of inability to prepare a defense to the charges as a result of expedited procedures, that the public has a right to be protected against any firm selling options in violation of the Commission's regulations, and that both the public and Lloyd, Carr & Co. had a right to obtain a prompt decision as to whether Lloyd, Carr & Co.'s futures commission merchant application should be granted or refused (A 31-35).

The order of expedition provided that the Rules of Practice governing pre-hearing discovery of investigatory materials, stipulations, appearances, public hearings, record of hearings, conduct of hearings, taking of evidence, and issuance of subpoenas, 17 C.F.R. §§10.42(b), 10.43, 10.62, 10.64-10.68 (1977), would apply to the expedited proceeding.

^{46/} Expedited proceedings are not, of themselves, inconsistent with fundamental fairness. See Gulf States Utilities Co. v. Federal Power Commission, 411 U.S. 747, 762-763 (1973); Silverman v. Commodity Futures Trading Commission, *supra*, CCH Comm. Fut. L. Rep. ¶20,487 at p. 21,981; Consumer Federation of

Petitioners do complain, however (Br. at 31-38), that the ALJ closed the administrative proceeding without hearing the testimony of three witnesses petitioners' proposed to offer and thus deprived petitioners of due process. While no proffer was made to the ALJ regarding the substance of the anticipated testimony of these three witnesses, petitioners now claim that their testimony would have "conclusively" shown that Lloyd, Carr & Co. met the Commission's futures commission merchant licensing requirements on January 17, 1977, and that its books and records, at the time of the hearing, were "in compliance" with the Commission's regulations. (Br. at 34).

Even if these claims be accepted as true, however--although we do not concede the point--they are irrelevant to the issues framed by the administrative complaint and to the issues properly before

46/ (Footnote continued)

America v. Federal Power Commission, 515 F.2d 347, 354-355 n. 45 (D.C. Cir. 1975).

The Administrative Procedure Act, 5 U.S.C. §556, expressly commits procedural judgments to the agency's discretion, and the Supreme Court has specifically held that administrative agencies "should be free to fashion their own . . . [procedures] and pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134, 143 (1940). See also, Association of Massachusetts Consumers, Inc. v. Securities and Exchange Commission, supra, 516 F.2d 711 (D.C. Cir. 1975). In the instant case the adoption of expedited procedures served the public interest without adversely affecting petitioners' right to defend themselves against the charges in the complaint. See Silverman v. Commodity Futures Trading Commission, supra, CCH Comm. Fut. L. Rep. ¶20,487 at p. 21,981.

this Court. The evidence is clear that Lloyd, Carr & Co. intentionally and deliberately violated the registration requirements on and after January 17--whether or not it was fit to be registered on that date--and that Lloyd, Carr & Co. unjustifiably denied access to Commission personnel who sought only to discover the true financial condition of the firm.

Moreover, even if evidence of later compliance with recordkeeping requirements had been introduced, it would at most have been relevant to a question of mitigation of the books and records violations found by Commission auditors on January 20 and 21 (A 159-163); but the sanctions imposed by the Commission were not based on the recordkeeping violation as the Commission noted in its opinion (A 175). Thus, the testimony that petitioners claim to have been erroneously excluded could not, in any event, have affected the Commission's judgment concerning the facts upon which it relied or affect the propriety of the action taken by the Commission on the basis of those facts (A 168-169 n. 50).^{47/}

^{47/} Petitioners mislead the Court in suggesting that counsel for the Division of Enforcement "conceded" that exclusion of this evidence that might have been introduced "would" be reversible error (Br. 34). Counsel stated only that petitioners should have the opportunity to demonstrate compliance with the Commission's bookkeeping regulations at the time of the hearing because compliance, even at that late date, might be relevant to mitigating any sanction that might have been imposed for that violation (A 752-753). Since the Commission imposed no sanction for the recordkeeping violation, it is moot whether it might have been error to exclude evidence of later compliance with the bookkeeping requirements.

In any event, the closing of the administrative proceeding without the testimony of petitioners' last three witnesses involved nothing more than a proper exercise of the ALJ's authority to control the progress of the hearing and did not deprive petitioners of due process. An administrative law judge, as the presiding officer at an administrative hearing, has broad power to regulate the conduct of the hearing, Silverman v. Commodity Futures Trading Commission, supra, 549 F.2d at 33; Fitzgerald v. Hampton, 467 F.2d 755, 767 (D.C. Cir. 1972); Fairbank v. Hardin, 429 F.2d 264, 267 (9th Cir.), cert. denied, 400 U.S. 943 (1970); Cella v. United States, 208 F.2d 783, 789 (7th Cir. 1953), cert. denied, 347 U.S. 1016 (1954). Here, the record shows that the ALJ's power to close the hearing was exercised only after petitioners' counsel had engaged in a series of dilatory tactics apparently calculated to provoke the ALJ to take action that might provide a basis to challenge the proceeding other than on the weight of the evidence. Since the remedial action taken by the ALJ was well within his discretion, however, and cannot be shown to have unfairly prejudiced the petitioners, petitioners have no basis to complain that their attorney succeeded in provoking decisive action by the ALJ.

Due process in administrative proceedings is, by necessity, a flexible concept,^{48/} which is satisfied when fundamental fairness has

^{48/} E.g., Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961); Federal Communications Commission v. WJR, the Goodwill Station, 337 U.S. 265, 275 (1959); Escalera v. New York City Housing Authority, 425 F.2d 843, 861 (2d Cir. 1970).

been observed. See, e.g., Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895-896 (1961); Joint Anti-Facist Refugee Committee v. McGrath, 341 U.S. 123, 162-163 (1951) (concurring opinion); Escalera v. New York City Housing Authority, 425 F.2d 853, 861 (2d Cir. 1970).^{49/} Fundamental fairness, and hence due process, is achieved when, as here, the adverse party has received a fair opportunity to present its side of the case. E.g., Goldberg v. Kelly, 397 U.S. 254, 267-268 (1970); RCA Global Communications, Inc. v. Federal Communications Commission, 559 F.2d 881, 885 (2d Cir. 1977); Escalera v. New York City Housing Authority, *supra*, 425 F.2d at 861-863.

The evidentiary hearing was originally scheduled to begin on March 8, 1977, in Boston. The first day of the hearings was postponed until March 9, however, at the request of Lloyd, Carr & Co.'s counsel (A 38; A 40-41). Thereafter, despite the Commission's order that the hearings continue to completion without interruption, the ALJ tolerated afternoon adjournments on March 10 and 11, and the Commission allowed a recess on March 14, to allow Lloyd, Carr & Co.'s counsel to attend to other legal matters (A 42, 86-87, 426-428).

The disruptive effect of these repeated adjournments were aggravated by the apparent inability or unwillingness of petitioners' counsel to present evidence on behalf of petitioners in an expeditious and orderly manner when his busy schedule allowed him to participate in the proceeding.

^{49/} Accord: Goldberg v. Kelly, 397 U.S. 254, 263 (1970); Federal Communications Commission v. WJR, the Goodwill Station, Inc., *supra*, 337 U.S. at 275-276 (1949); Fitzgerald v. Hampton, 467 F.2d 755, 763-764 (D.C. Cir. 1972); Swift & Co. v. United States, 308 F.2d 849, 851-852 (7th Cir. 1962).

Charles P. LeMieux III, James Carr's partner, and a respondent in the proceeding had been subpoenaed to appear pursuant to Commission Rule of Practice 10.68(a), 17 C.F.R. §10.68(a) (1977) (A 626-627). He did not, however, appear to testify when called on March 17. Petitioners' attorney stated that he had been unable to get in touch with Mr. LeMieux, who on the previous day had been in Canada (A 627, 855-857). On March 18 he represented that petitioners would have other witnesses available to testify when the hearing resumed on March 21, although Mr. LeMieux' availability as a witness remained uncertain (A 898-899). Nevertheless, on March 21, when Mr. LeMieux again failed to attend the hearing, petitioners' counsel was wholly unprepared to go forward-- he had instructed his witnesses not to appear since it was "unlikely" that they would have to testify until the next day (A 908).^{50/}

When no witnesses were available to testify on March 21 the ALJ asked petitioners' counsel who his witnesses would be the next day and counsel stated, "one of them will be Mr. Labus. I haven't decided who the others are yet" (A 910). When asked again about potential witnesses, petitioners' counsel again stated that he had not yet decided on his witnesses and had not "had a chance to interview them" (A 911). A third inquiry concerning the identity of petitioners' witnesses for March 22 was likewise unsuccessful (A 913-914). Before adjourning at 10:50 a.m., after only 50 minutes (A 914),

^{50/} The basis for counsel's instruction to his witnesses is not apparent. The record shows that counsel claimed to have been unable to reach Mr. LeMieux since the morning of March 16, and contains not the slightest suggestion why he might have assumed his luck would change. Thus, he must have understood that without his witnesses there would likely be no testimony on March 21.

the ALJ then told counsel, ". . . we're going to run six hours tomorrow, three in the morning and three in the afternoon. Try to have your witnesses fill up that space and time" (A 914). Notwithstanding the ALJ's admonition, however, the hearing was again forced to adjourn early on March 22, because the testimony of petitioners' three witnesses (one of whom was a Commission staff member) took only 2 1/2 hours.^{51/}

At that point, shortly before 3:00 p.m. on March 22, 1977, the ALJ told petitioners' counsel (A 997-998):

"JUDGE POINTER [sic]: Mr. Hecht, I regret that fact that you have left the good portion of this day open again because I hesitate to point it out but I think ~~we~~ had a number of delays where occasions ~~for~~ other duties. I don't like waffling on ~~and~~ I made this morning or yesterday afternoon. I would like to wind this hearing down and be finished with it.

"You have two more witnesses that you want to put on?

^{51/} Petitioners try to justify the abbreviated session on March 22 on the ground that it resulted from adverse evidentiary rulings by the ALJ. But the record shows that petitioners' counsel was not inhibited in his examination of two of the three witnesses he called that day--Lloyd, Carr & Co. Director of Operations John J. Cosulich (A 921-949), and Commission staff member William J. Paulek (A 962-985). The ALJ cut short only a portion of the testimony of John Gill--testimony that would have concerned Lloyd, Carr & Co.'s training program and its methods of operation. In fact, the ALJ permitted Mr. Gill to testify on these matters in some detail (A 951-957), before excluding further testimony as not relevant to the charges in the complaint (A 957) and because he apparently felt it was cumulative (A 957, 959). Even so, petitioners' counsel himself estimated that Mr. Gill's testimony would have taken "2-3 hours" (A 997), which still would have fallen short of the six hours of testimony the ALJ had requested the day before. In any event, counsel should have been aware that evidentiary rulings might affect the length and scope of a witness' testimony; accordingly, he should have had other witnesses available. A litigant is charged with the responsibility of obtaining the attendance of witnesses in a timely fashion. See United States v. Grooms, 454 F.2d 1308, 1311 (7th Cir. 1972).

"MR. HECHT: I said there is [sic] three more that I am putting in tomorrow, Mr. Labus, Mr. Winston [sic] and Mr. Carr.

"JUDGE POINTER [sic]: I suggest you get in touch with those parties right now and be prepared to start testimony at 8:30 tomorrow morning. I will be here and if there is no one else here I will close the lid on this hearing and send the transcript to the Commission.

"MR. HECHT: Your Honor--

"JUDGE POINTER [sic]: They may come here tonight and they can put themselves up in their own accommodations and we are ready to go.

"MR. HECHT: Your Honor, I think what's fair is fair. I have objected strenuously to the location of the hearing here. . . ." 52/

Before adjourning the ALJ again cautioned petitioners' counsel (A 1000):

"JUDGE POINTER [sic]: If there is no one at 8:30 there won't be anyone called. If Mr. Hecht is planning to call additional witnesses they better be lined up in the hall ready to take that seat the moment we are finished with the other witnesses.

"MR. HECHT: Your Honor, I stated my position on the record. I will get them here as early as I can. I think it is an unfair imposition.

"JUDGE POINTER [sic]: I think it is an imposition they are not here before 3 o'clock this afternoon. . . .

52/ As the Commission found (A 130, n. 7), there is no objection in the record to the ALJ's transfer of the proceedings to Washington for March 21. The objection noted by petitioners (Br. at 21; A 454) related only to the ALJ's March 11 proposal to move the hearings to Washington the week of March 14. The record also indicates that the administrative law judge had consistently sought to accommodate petitioners with regard to the location of the hearing--opening it in Boston, proposing to hold the second week in New York at petitioners' request and then moving it back to Boston, again at petitioners' request (A 507-508, 909).

"JUDGE POINTER [sic]: While we are on the record, this hearing will be concluded if there are no witnesses available to testify tomorrow morning at 8:30 in this same room."

When, at 8:30 a.m. on March 23, petitioners had no witnesses available, the ALJ, as he had warned the day before, ended the hearing at 8:32 a.m. (A 1002).^{53/}

As the ALJ described his action in his recommended decision (A 91) which was adopted by the Commission (A 167-168):

"The failure of respondents' counsel to have witnesses available pursuant to the explicit and unambiguous orders of the presiding official the preceding day represents either a callous indifference to the hearing process, or a deliberate and calculated effort to make it appear that respondents were being denied an opportunity to participate fully and fairly in this hearing that they did not want. The record must speak for itself. At 8:33 a.m. on March 23, 1977, the hearing was closed." ^{54/}

^{53/} In affidavits that the ALJ admitted into the record after the hearing, Mr. Carr (A 113) and Irwin Winsten (A 110), a partner in Lloyd, Carr & Co.'s accounting firm, asserted that they were unable to get to Washington the night before because of previous business commitments and bad weather. Petitioners do not offer any reason, however, why they had not previously arranged to have their witnesses in Washington to testify and to have had their witnesses resolve any conflicting commitments in favor of their appearance in the proceeding. Nor do they even suggest that they attempted to do so. To the contrary, although petitioners' counsel announced on March 22 he intended to call Lloyd, Carr & Co.'s accountant on March 23 (A 815), Mr. Winsten appears not to have been aware of his scheduled testimony until the afternoon of March 22, as his affidavit states he had to cancel tax conferences scheduled for March 23 in order to come to Washington for the hearing (A 111). The nearly irresistible inference to be drawn from this record is that petitioners' counsel would not even have attempted to have these witnesses present to testify on March 23 had the ALJ not been firm in his warning. He has only himself to blame if, as a consequence of prior neglect, he was unable to meet the deadline set by the ALJ.

^{54/} The administrative law judge, as we have noted, gave petitioners yet another opportunity to show that their books and records were in compliance with Commission regulation, by offering to allow the findings of an independent auditor to be included in the record (A 69). Petitioners declined the ALJ's offer (A 101).

CONCLUSION

For the foregoing reasons, the order of the Commission should be affirmed.

Respectfully submitted,

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November 10, 1977



STATUTORY APPENDIX



Commodity Exchange Act, as amended

Section 4c(b), 7 U.S.C. §6c(b) (Supp. V, 1975):

(b) No person shall offer to enter into, enter into or confirm the execution of, any transaction subject to the provisions of subsection (a) of this section involving any commodity regulated under this Act, but not specifically set forth in section 2(a) of this Act, prior to the enactment of the Commodity Futures Trading Commission Act of 1974, which is of the character of, or is commonly known to the trade as, an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty", contrary to any rule, regulation, or order of the Commission prohibiting any such transaction or allowing any such transaction under such terms and conditions as the Commission shall prescribe within one year after the effective date of the Commodity Futures Trading Commission Act of 1974 unless the Commission determines and notifies the Senate Committee on Agriculture and Forestry and the House Committee on Agriculture that it is unable to prescribe such terms and conditions within such period of time: *Provided*, That any such order, rule, or regulation may be made only after notice and opportunity for hearing: *And provided further*, That the Commission may set different terms and conditions for different markets.

Regulations Under the Commodity Exchange Act

Regulation 1.18, 17 C.F.R. §1.18 (1977):

(a) No person shall be registered as a futures commission merchant under the Act unless, commencing on the date his application for such registration is filed, he prepares and keeps current, ledgers or other similar records which show or summarize with appropriate references to supporting documents, each transaction affecting his asset, liability, income, expense and capital accounts, and in which (except as otherwise permitted in writing by the Commission) all his asset, liability and capital accounts are classified into either the account classification subdivisions specified on Form 1-FR or categories that are in accord with generally accepted accounting principles. Each person so registered shall prepare and keep current such records.

(b) No person shall be registered as a futures commission merchant under the Act unless he prepares, from his ledgers or other records, a trial balance as of the end of each of his month-end closing business days, commencing with the first month-end closing date after he files his application for such registration. Such trial balances shall be prepared no later than 15 days after each such closing date. Each person so registered shall continue to prepare such month-end trial balances no later than 15 days after each month-end closing date.

(c) No person shall be registered as a futures commission merchant under the Act unless he prepares, as of the end of each month-end closing date subsequent to the date of filing his application for such registration, a written computation of the total of his subordinated borrowings, the total of his long term liabilities and the total of his net worth. Such computation must be prepared no later than 15 days after the applicant's month-end closing date; and the applicant must promptly thereafter inform the Commission of the sum of such totals. . . .

Regulation 1.31, 17 C.F.R. §1.31 (1977):

(a) All books and records required to be kept by the Act or by these regulations shall be kept for a period of 5 years from the date thereof and shall be readily accessible during the first 2 years of the 5-year period. All such books and records shall be open to inspection by any representative of the Commission or the U. S. Department of Justice. . . .

Regulation 32.3, 17 C.F.R. §32.3 (1977):

(a) On and after January 17, 1977, it shall be unlawful for any person to accept any money, securities, or property (or to extend credit in lieu thereof) from an option customer as payment of the purchase price in connection with a commodity option transaction unless such person is registered as a futures commission merchant under the Act and such registration shall not have expired, been suspended (and the period of suspension has not expired) or revoked.

(b) On and after January 17, 1977, it shall be unlawful for:

(1) Any person to solicit or accept orders (other than in a clerical capacity) for the purchase or sale of any commodity option, or to supervise any person or persons so engaged, unless such person is

(i) Registered as a futures commission merchant under the Act, or

(ii) If such person is an individual, registered as an associated person of a specified futures commission merchant under the Act; and such registration shall not have expired, been suspended (and the period of suspension has not expired) or revoked; and

(2) Any futures commission merchant to permit an individual to become or remain associated with such futures commission merchant as a partner, officer or employee (or in any similar status or position involving similar functions) in any capacity involving such solicitation, acceptance or supervision if such futures commission merchant knew or should have known that such individual was not registered as an associated person or that such registration has expired, been suspended (and the period of suspension has not expired) or revoked

Regulation 32.7, 17 C.F.R. §32.7 (1977):

(a) Each person which accepts any money, securities or property (or extends credit in lieu thereof) from an option customer as payment of the purchase price in connection with a commodity option transaction shall keep full, complete and systematic records together with all pertinent data and memoranda of or relating to such transactions. Such records shall at least include all orders (filled, unfilled or cancelled), signature cards, books of record, journals, ledgers, cancelled checks, copies of all statements of purchase, exercise or lapse, and reports, letters, disclosure statements required by § 32.5 of this Part, solicitation or advertising material (including the texts of standardized oral presentations and of radio, television, seminar or similar mass media presentations) circulars, memoranda, publications, writings, and all other literature or written advice distributed to option customers or prospective option customers. Upon the request of an authorized representative of the Commission, such person shall furnish the true name and address of each commodity option customer or prospective commodity option customer solicited.

(b) Each person referred to in paragraph (a) of this section shall also keep a record in permanent form which shall show the true name and address of each maker, underwriter, issuer or other person who assumes or purports to assume any financial responsibility for the fulfillment of any commodity option transaction solicited or accepted by such person, to the extent that such information is known or may be reasonably obtained by such person.

(c) Each person which accepts an order for a commodity option transaction from a person other than an option customer, shall keep full, complete and systematic records together with all pertinent data and memoranda of or relating to the transaction. Such records shall at least include the items set forth in paragraph (b) of this section and, to the extent necessary to reflect such person's participation in the transaction, shall include all items set forth in paragraph (a) of this section.

(d) Each person which accepts an order for a commodity option shall immediately upon receipt thereof prepare a written record of such order, including an account identification and order number, and shall record thereon by time-stamp or other device, the date and time, to the nearest minute, that (1) the order is accepted, (2) the order is transmitted for execution, and (3) the order is executed.

(e) All records, memoranda and other documents required to be maintained by paragraphs (a) through (c), and to be prepared by paragraph (d), of this section shall be retained for the period specified in § 1.31 of this chapter, and each person required to maintain such records shall be required to produce the same for inspection and furnish true and correct copies thereof and information and reports as to the contents or meaning thereof, when and as requested by any authorized representative of the Commission or the United States Department of Justice.



COMMODITY FUTURES TRADING COMMISSION

2033 K Street, N.W., Washington, D.C. 20581

OFFICE OF
THE GENERAL COUNSEL

November 10, 1977

A. Daniel Fusaro, Esquire
Clerk
United States Court of Appeals
for the Second Circuit
U.S. Courthouse, Foley Square
New York, New York 10007

Re: Lloyd, Carr & Co. v. Commodity Futures Trading Commission
No. 77-4146 (CA 2)

Dear Mr. Fusaro:

Enclosed for filing with the Court in the above-referenced case are ten (10) copies of the BRIEF OF THE COMMODITY FUTURES TRADING COMMISSION, RESPONDENT.

I hereby certify that on November 10, 1977 I caused to be served by United States mail, postage prepaid, two (2) true copies of the Commission's Brief on counsel for Petitioners as follows:

Leslie H. Arps, Esquire
Skadden, Arps, Slate, Meagher & Flom
35th Floor
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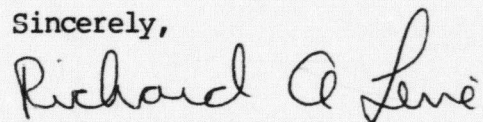
Daniel J. Henry, Jr., Esquire
Bushnell, Gage & Reizen
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3000 Town Center
Southfield, Michigan 48075

In addition, I hereby certify that on November 10, 1977 I caused two (2) true copies of the Commission's Brief to be served upon counsel for Petitioners by hand as follows:

Leslie H. Arps, Esquire
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Sincerely,

A handwritten signature in cursive script that reads "Richard A. Levie". The signature is written in dark ink and is positioned to the right of the word "Sincerely,".

Richard A. Levie
Special Counsel